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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339

)

) Div. 6

)

) **REPLY IN SUPPORT OF**
) **MOTION TO DISMISS WITH**
) **PREJUDICE**

)

)

)

)

)

) **UNDER SEAL**

22 This Court should dismiss this case with prejudice based on the State's repeated,
23 ongoing pattern of misconduct. The State's conduct since the filing of the motion to
24 dismiss with prejudice may be the best evidence yet of its deliberate, malicious attempts
25 to interfere with Mr. DeMocker's right to counsel and its unabated pursuit of a mistrial.

1 **I. The State's Continued Misconduct and Attempts to Create a Mistrial**

2 After two years of failing to exercise due diligence in its investigation of the
3 Hartford Life Insurance policies, on July 9, the State indicated it intended to call Mr.
4 DeMocker's counsel, John Sears, to testify about the disposition of the Hartford Life
5 Insurance policies. On July 12, the State filed under seal a Motion for Determination of
6 Counsel with Chronology of Events and Exhibits.¹ On July 14, the Court held a hearing
7 and denied the State's Motion contingent upon answers to four questions posed to the
8 defense. On July 15, the defense answered the questions and indicated they could
9 proceed if the false accusations of the State were no longer raised in the case. On July
10 16, the Court held that "[a]nd that means that this trial would not involve accusations in
11 any fashion of wrongdoing by the defense team. It is not. That, in itself, eliminates a
12 lot of the records right there." (July 16, 2010 Sealed Transcript 6:6-9). The only open
13 issue with respect to the Hartford Life Insurance policies after July 16 was the issue of
14 what would be admissible regarding Mr. DeMocker's "disclaimer" of benefits. Trial
15 resumed on July 21.

16 Two months after the State claimed it first learned of the Hartford Life Insurance
17 payout to Katie and Charlotte DeMocker in April 2009 and almost two weeks after trial
18 resumed, the State filed two disturbing pleadings at 5:00 on August 2. These pleadings,
19 for the first time, made the shocking announcement that "[w]ith regard to the suspicion
20 of misconduct by defense counsel, the State has referred or will refer the issues to the
21 appropriate bodies for investigation." (State's Response to Defendant's Motion to
22 Dismiss, pg. 3; emphasis added). Further, in a separate "Motion for Protective Order"
23 the State attempted to withhold documents and interviews from the defense, claiming
24 that the information is also relevant "in the tangential criminal investigation" of the
25

26 _____
27 ¹ At the same time, the State filed copies of these pleadings in the Superior Court probate case assigned to Judge
28 Mackey, as attachments to a document styled "Notice of Irregularities".

1 disposition of the Hartford Life Insurance proceeds. Through these pleadings, the Court
2 and the defense learned for the first time that the State [REDACTED]
3 [REDACTED], and that it had initiated a criminal investigation involving defense
4 counsel (and perhaps others).

5 The Court denied the State's Motion for Protective Order during an under seal,
6 in-chambers proceeding on August 3 and directed the State to disclose the interviews
7 and police reports by the close of business that day. The State disclosed portions of the
8 interviews and provided a disk that purported to contain a single police report related to
9 the insurance documents. The disk did not contain that police report. No other reports
10 regarding this investigation or these interviews have been received by the defense. The
11 State indicated at this hearing that it had not done any investigation since July 14th and
12 had stayed the criminal investigation though it continues to receive and presumably
13 review documents in response to subpoenas. The State said the matter would be
14 referred outside of Yavapai County for any additional investigation and charging
15 decisions.² However, the State also announced [REDACTED]

16 [REDACTED] The Court explained that the defense had made clear in
17 earlier proceedings that their ability to proceed as counsel "really had to be with the
18 understanding that they would not be defending themselves, if you will, in something
19 that involves their client." (August 3 Transcript, Under Seal, 17:2-6). The State's most
20 recent pleadings and conduct obviously was designed to put defense counsels' ability to
21 proceed in question. The jury was dismissed for the week and told to check in on
22 Tuesday, August 10 to see if trial would resume on August 11.

23 An additional under seal hearing was held on August 4. At that hearing, the
24 State's duplicity became startlingly clear. The State first advised the Court that it had
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27 ² Although this assertion was made by the State on both August 3 and 4, the State also refused on August 4 to put
28 this avowal in writing.

1 decided [REDACTED] against defense counsel. The State reconfirmed the
2 existence of a related criminal investigation, and advised that it was being stayed. The
3 State further avowed to the Court that counsels' misconduct [REDACTED]
4 [REDACTED] and the criminal investigation related to Mr. DeMocker's motive in the
5 underlying homicide case. Yet, the State intimated that the trial can and should proceed
6 with this defense counsel. The State also claimed it was entirely unaware that its'
7 conduct and accusations against defense counsel might give rise to an unwaivable
8 conflict. These claims by the State strain credulity.

9
10 **II. The State's Pattern of Deliberate Interference with Mr. DeMocker's
Sixth Amendment Right to Counsel**

11 Article 2, Section 10, of the Arizona Constitution, the double jeopardy clause,
12 forbids retrial when there is "intentional prosecutorial misconduct." *State v. Jorgenson*,
13 198 Ariz. 390, 391, ¶¶ 3-4, 10 P.3d 1177, 1178 (2000). The State's most recent
14 pleadings further reveal its true intent to create a false conflict and to deprive Mr.
15 DeMocker of his right to counsel. At the hearing on July 14, the Court asked the State
16 to present its evidence of misconduct. The State had a full opportunity to proffer
17 information and offer argument. The State also filed a chronology of its accusations
18 along with allegedly supporting documentation. The Court found that an evidentiary
19 hearing was not required³ and concluded that, based on everything presented by the
20 State, there "has not been a showing sufficient to this Court suggesting a reason for why
21 this defense team can't continue in this manner." (July 16 Transcript, Under Seal, 6:3-
22 5.) Instead of accepting this, the State initiated a criminal investigation [REDACTED]
23 [REDACTED]

24 As the State's response acknowledges, the cumulative effect of prosecutorial
25 misconduct must be considered in determining whether to grant a mistrial. While
26

27 ³ The Court advised the parties to have witnesses it intended to call prepared to testify on July 14. The State
28 indicated it had a single officer witness prepared to offer testimony.

1 acknowledging this, the State's response entirely fails to address its prior deliberate
2 attempts to interfere with Mr. DeMocker's right to counsel.⁴ These attempts include
3 both [REDACTED] against Mr. Sears that was unfounded and dismissed [REDACTED]
4 [REDACTED] as well as the State's attempt to make Mr. Sears a witness regarding the head cover,
5 which was summarily denied by the Court. A further example of the State's earlier
6 attempts to deny Mr. DeMocker counsel was its misconduct in again attempting to make
7 Mr. Sears a witness to the "voice in the vent" issues in the middle of trial. The State
8 waited over a month from when it says Judge Lindberg's order made Mr. Sears'
9 testimony relevant to notice Mr. Sears as a witness. This attempt was also denied. The
10 State's prior attempts to interfere with Mr. DeMocker's right to counsel must be
11 understood as the backdrop to the State's present, unrelenting attempts to do so again.
12 [REDACTED]
13 [REDACTED]

14 The fourth and latest of the State's attempts to interfere with Mr. DeMocker's
15 right to counsel began on July 9 when the State identified John Sears as a witness in
16 open court regarding the Hartford Insurance issues. The State's motion to determine
17 counsel made wild, defamatory and unsupported accusations of criminal conduct,
18 violations of the Code of Professional Conduct and a fraud on the court. The Court
19 provisionally denied the State's Motion on July 14 and on July 16 determined that
20 defense counsel could proceed. The Probate Court also promptly denied the State's
21 "Notice of Irregularities" related to these same allegations. Unwilling to accept the
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23 ⁴ The State's response also fails to address its other misconduct not directly directed at Mr. DeMocker's Sixth
24 Amendment right to counsel. This misconduct includes misstatements and omissions to the first grand jury,
25 resulting in a remand by the Court; late disclosure of thousands of documents, witnesses and experts, previously
26 sanctioned by the Court; the filing of a frivolous motion to disqualify the Court to avoid the Court's evidentiary
27 rulings which was promptly denied by Judge Brutinel; the filing of a frivolous Special Action during jury
28 selection, where jurisdiction was declined by the Court of Appeals; the filing of a motion for sanctions, later
withdrawn, against victims' counsel Chris Dupont; the late dismissal of the death penalty after death qualifying a
jury of 40 people, at great expense to the Court, the parties and the County; violations of Court orders regarding
biological evidence, sanctioned by the Court; and the destruction of biological evidence, also sanctioned by the
Court.

1 fourth and fifth denials from both this Court and the Probate Court, the State apparently
2 proceeded, unbeknownst to counsel or the Court, to criminally investigate counsel [REDACTED]
3 [REDACTED]
4 [REDACTED].

5 The State's constant and unrelenting attempts to interfere with Mr. DeMocker's
6 right to counsel could not be more clear or consistent. As the Supreme Court noted in
7 *Wheat*, the "Government may seek to 'manufacture' a conflict in order to prevent a
8 defendant from having a particularly able defense counsel at his side; but trial courts are
9 undoubtedly aware of this possibility, and must take it into consideration along with all
10 of the other factors which inform this sort of a decision." *Wheat v. United States*, 486
11 U.S. 153, 163 (1988). The State has attempted to create a conflict here.

12
13 **III. The State Has Attempted to Force A Mistrial; Dismissal With
14 Prejudice is Therefore Required**

15 The State's conduct in [REDACTED] against counsel *mid-trial* and in
16 initiating a criminal investigation at the same time, all the while failing to inform the
17 Court or counsel until well after trial was resumed, must also be seen for what it is: an
18 attempt to avoid resumption and completion of trial with this jury. The State created
19 this problem by initiating a criminal investigation and [REDACTED]
20 [REDACTED]. The Court and defense counsel were clear in mid-July that the ability of defense
21 counsel to proceed was contingent on defense counsel not being required to defend
22 themselves against allegations involving them and Mr. DeMocker. It was entirely
23 disingenuous for the State to simultaneously claim that it saw no issue with counsel
24 proceeding with trial and to make the allegations it was making [REDACTED] and
25 in this Court while initiating criminal investigations. Either the State does not believe
26 the allegations it is making, OR it must believe that counsel have an unwaivable
27 conflict. The State's professed ignorance of a possible unwaivable conflict in the face
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1 of allegations of criminal conduct by defense counsel and [REDACTED] defy
2 all reason and must be rejected by this Court.

3 The United States Supreme Court has held that where a prosecutor intentionally
4 provokes a defendant to request a mistrial, dismissal with prejudice is appropriate.
5 There is likely no clearer case than this for a finding that the “conduct giving rise to the
6 successful motion for a mistrial was intended to provoke the defendant into moving for
7 a mistrial.” *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982),
8 the *Id.* at 2091. There is simply no other explanation for the State’s conduct in this case.
9 The Court may “[i]nfer[] the existence or nonexistence of intent from objective facts
10 and circumstances is a familiar process in our criminal justice system.” *Id.* at 2089.
11 The Arizona Supreme Court agrees, in upholding the dismissal with prejudice in
12 *Hughes*, stating: “ ‘the burden of another trial cannot be attributed to defendant’s
13 preference to start anew rather than “completing the trial infected by [an] error” and is,
14 rather, attributable to the “state’s readiness, though perhaps not calculated intent, to
15 force the defendant to such a choice.” ’ ” *State v. Jorgenson*, 198 Ariz. 390, ¶ 6, 10 P.3d
16 1177, ¶ 6 (2000), *quoting Pool*, 139 Ariz. at 109, 677 P.2d at 272, (*quoting State v.*
17 *Kennedy*, 295 Or. 260, 666 P.2d 1316, 1326 (1983)).

18 The *Trani* decision cited by the State is instructive in requiring dismissal with
19 prejudice in this case. In *State v. Trani*, the Court found that where there was no pattern
20 of misconduct, the Court abused its discretion in declaring a mistrial with prejudice.
21 *State v. Trani*, 200 Ariz. 383, 386-7 (App. 2001). The prosecutor’s misconduct in *Trani*
22 was to introduce inadmissible hearsay as impeachment. However, the *Trani* Court
23 noted that dismissal with prejudice was not required because “*the objective facts do not*
24 *indicate the prosecutor intended to force Trani to either finish a trial infected with error*
25 *or choose a mistrial.*” *Id.* (emphasis added). Here the State, by attempting to withhold
26 evidence in Mr. DeMocker’s criminal case, initiating a criminal investigation of his
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1 counsel, [REDACTED] against counsel mid-trial and the ongoing pattern of other
2 misconduct, has put Mr. DeMocker to the Hobson's choice of proceeding with a trial
3 potentially infected with error or to choose a mistrial. This situation is entirely the
4 responsibility of the State. The Court had adjudicated these issues as not relevant and
5 inadmissible. The State, refusing to accept this, proceeded to criminally investigate, [REDACTED]
6 [REDACTED], and attempt to withhold relevant evidence from the defense. All in the
7 face of an avowal from defense counsel that their continued representation was
8 contingent on the State NOT doing those things while trial was pending.

9 As the *Jorgenson* court stated:

10 Application of double jeopardy is not only doctrinally correct when
11 egregious and intentional prosecutorial misconduct has prevented
12 acquittal, it is also required as a matter of pragmatic necessity. Any other
13 result would be an invitation to the occasional unscrupulous or
14 overzealous prosecutor to try any tactic, no matter how improper,
15 knowing that there is little to lose if he or she can talk an indulgent trial
16 judge out of a mistrial. The worst that could then happen is reversal for a
17 new trial and another shot at a conviction. This, of course, is exactly the
18 type of governmental abuse at which the double jeopardy clause was
19 aimed.

20 *Id.* 198 Ariz. 390, ¶ 13. The State's wrongful attempts must be stopped by this
21 Court and a mistrial with prejudice should be declared.

22 CONCLUSION

23 The most inexplicable action by the State occurred yesterday. The State, in a
24 complaint signed by County Attorney Sheila Polk, actually filed its threatened Bar
25 Complaint. It did so within four hours of yesterday's sealed proceeding. As this Court
26 will well recall, in the course of the sealed proceeding counsel for the State attempted to
27 convince the Court that the State had no idea that its actions might have the effect of
28 compromising the Court's and defense counsel's ability to proceed with this trial. The
State claimed to have been unaware that its actions could be occasioning this result. We

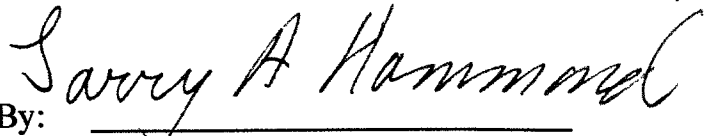
1 have said that the State's protestations of ignorance with respect to the operation of the
2 ethical rules, strained all credulity. After all, the State had filed a Motion to Determine
3 Counsel. In response to that motion, defense counsel filed a response entitled
4 Defendant's Position on State's Motion for Determination of Counsel (filed under seal
5 on July 13, 2010). In that pleading, we cited *Wheat* and the relevant ethical rules.
6 Nevertheless, the State claimed to be ignorant. There is no possible claim of ignorance
7 with respect to the potential consequences, however, after the Court hearing yesterday
8 morning. [REDACTED]
9 [REDACTED]

10 The cumulative effect of the State's pattern of misconduct, in pretrial
11 proceedings, in delaying the resumption of trial after Judge Lindberg's illness,⁵ and in
12 its present attempts to generate a conflict can be for no other reason than to force a
13 mistrial. The State should not be permitted to get away with forcing Mr. DeMocker to
14 choose between resuming trial with possibly conflicted counsel – conflicted entirely
15 through the actions of the State - or declaring a mistrial. The accusations against
16 counsel are unfounded and the conflict suggested is now entirely of the State's own
17 creation. The Double Jeopardy Clause was designed to prevent exactly this kind of
18 deceitful and abusive of process. Counsel request that the Court declare a mistrial and
19 dismiss the case with prejudice based on the State's deliberate and intentional attempts
20 to create a false conflict and force a mistrial.
21

22 ⁵ The State's response also does not deny, because it cannot, its misconduct in seeking to avoid
23 resumption and completion of this trial with this jury including rejecting thirteen of eighteen proposed judges and
24 proposing no judges to resume the trial; waiting a month to inform the Court and parties, in violation of 15.6, that
25 it had additional disclosure after Mr. Sears' opening statement; improperly inquiring as to the substance of *ex*
26 *parte* under seal orders of the Court; making public its allegations against Mr. DeMocker and his counsel resulting
27 in news coverage during the trial; making public false statements and accusations about the payment of Mr.
28 DeMocker's attorneys fees by Yavapai County taxpayers that also made it into the paper in this small community;
and creating a trial two months longer than proposed during voir dire and through the start of the trial (on this last
point the State's excuse is that it was apparently not expecting the defense to make objections or cross examine
State witnesses).

1
2 DATED this 5th day of August, 2010.

3 OSBORN MALEDON, P.A.

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6 By: _____

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15 **ORIGINAL** of the foregoing hand delivered for
16 filing this 5th day of August, 2010, with:

17 Jeanne Hicks
18 Clerk of the Court
19 Yavapai County Superior Court
20 120 S. Cortez
21 Prescott, AZ 86303

22 **COPIES** of the foregoing hand delivered this
23 this 5th day of August, 2010, to:

24 The Hon. Warren R. Darrow
25 Judge Pro Tem B
26 120 S. Cortez
27 Prescott, AZ 86303
28

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